Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

GREAT LAKES DREDGE & DOCK COMPANY,

Petitioner,

v.

BEYEL BROTHERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stevens v. The White City*, 285 U.S. 195 (1932), this Court held that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. Should this decision, in the application of which the courts of appeal are in conflict, be reconsidered and either explained, clarified or overruled?

Whether a damaged unmanned tow satisfies its burden by evidence of an occurrence or damage that is inconsistent with proper towage coupled with a failure of explanation by the tug.

PARTIES TO PROCEEDING

The petitioner is Great Lakes Dredge & Dock Company, a corporation, which was the plaintiff-appellant in the Court of Appeals. The petitioner appears for itself and for the use and benefit of its subrogated insurer, The National Ben Franklin Insurance Company of Illinois.

The respondent is Beyel Brothers, Inc., which was the defendant-appellee in the Court of Appeals. The respondent is insured by Paradigm Insurance Company, Louisville, Kentucky.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Great Lakes Dredge & Dock Company, is a wholly owned subsidiary of Great Lakes Dredge & Dock Corporation.

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Appendix I — 2 Thomas J. Schoenbaum, Admiralty And Maritime Law, § 12-4 At 249 (3d Ed. 2001) 50a

The petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals (App. A) is not formally reported. It is available electronically as *Great Lakes Dredge & Dock Company v. Beyel Brothers, Inc.*, 2001 U.S. App. LEXIS 1135. The decision in the district court is not reported. It is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on March 5, 2001. An order of the Court of Appeals denying a timely petition for rehearing was entered on May 7, 2001. (App. C).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8904(b) of Title 46 of the United States Code provides in pertinent part:

> (b) A towing vessel that is at least 26 feet in length . . . shall be operated by an individual licensed by the Secretary (of the Treasury) to operate that type of vessel in the particular geographical area, under prescribed regulations.

STATEMENT OF THE CASE

While being navigated some eighty-to-ninety miles off the Georgia coast, a tug owned and operated by the respondent towing company lost four of the five long dredge pipes which had been entrusted to her for tow. As a result, the petitioner, Great Lakes Dredge & Dock Company, filed an action in federal district court for damages. The jurisdiction of the district court was invoked under 28 U.S.C. § 1333 (admiralty and maritime jurisdiction). After a three-day trial, the district court entered judgment in favor of the respondent, Beyel Brothers. The court of appeals affirmed and later denied a petition for rehearing.

In early April 1997 the petitioner Great Lakes released the rafted pipe to the respondent Beyel for tow from Port Canaveral, Florida to Wilmington, North Carolina. (TR I, 49-50[1]) It was understood that:

- The tow should not be exposed to seas in excess of five feet (Depo-Bros at 88-89[2]), as such seas would have a propensity to damage the pipe (App. B at 3);

- The tow would follow the coastline as closely as safety, the depth of the water, and the circumstances permitted (TR II at 35-38; Pltf's Ex 79 at 4); and

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1. "TR" refers to the Transcript of Trial, in three volumes, which is part of the Record in this case.

2. Testimony was received at trial in the form of depositions, which were not incorporated into the transcript. They are part of the Record.

- The tow upon starting would proceed up the coast to the vicinity of Fernandina Beach, the northernmost city in Florida, where the then-forecasted weather would be evaluated and a determination made whether to take the tow inside or continue outside to the next stage of the voyage. (App. B at 3).

Owing to unfavorable weather forecasts the tug did not leave until Sunday, April 20, 1997 (App. B at 5), her initial destination Fernandina Beach. (Depo-Anderson at 23). On board were two watchstanding operators, neither of whom held the required Coast Guard license and each of whom thought the other to be in command. (App. B at 5).

Three days after leaving Port Canaveral, on Wednesday, April 23, 1997, the DOROTHY MCALLISTER arrived in Wilmington, North Carolina, but with only a single pipe in tow. (TR I at 50; Depo-Etheridge at 49-50) What transpired in between is nowhere clearly, systematically articulated. While a log had been maintained on board the tug, the respondent tug owner could not produce it. (TR I at 146-48; Depo-Anderson at 57-58; Depo Etheridge at 52, 85-87). The testimony of the tug's crew, three of whom testified by way of deposition, was on a large number of basic facts conflicting or, in several instances, in disagreement with the physical evidence.

Upon getting underway, the DOROTHY headed initially toward Fernandina Beach, as originally agreed. (App. B at 5). At some point that Sunday evening, the tug changed course to head away from Fernandina Beach, in the direction of the Carolinas. (Depo-Anderson at 26-27, 29; Depo-Etheridge at 39, App. B at 6). This deviation had the effect of taking the tug and her tow well offshore, at its maximum

about 100 miles (TR II at 76), and was made by the respondent without consulting the petitioner, which at no time acquiesced in it.

At 3:01 a.m. on Monday, about 10 hours into the voyage, a regular coastal marine forecast was issued by the National Weather Service, Miami, calling on small craft in the coastal waters between St. Augustine and Savannah to exercise caution. (App. B at 7; Pltf's Ex 71). The forecast, which covered the area inshore of that for which the tug was headed, expressly predicted seas of four feet near shore and up to seven feet as one approached 50 miles offshore. (Pltf's Ex 71).

At some point either late Monday evening or Tuesday morning, while the tug had been in waters north of St. Augustine for some time, the crew discovered that several of the pipes were missing. The tug notified the United States Coast Guard Group Charleston by radio, giving the position of the tug and reporting seas of seven-to-eight feet. (Pltf's Ex 5). The Coast Guard determined the position given to be about 70 miles East South East of a navigational aid at the entrance to the Savannah ship channel. (Pltf's Ex 5).

The tug continued on its voyage to Wilmington, and shortly after midnight on Wednesday morning, April 23, 1997, reported to the Coast Guard that yet another pipe had been lost. (Pltf's Ex 5; Depo-Etheridge at 47). As noted, the tug arrived at her intended destination with but one of the five pipes.

The respondent made no effort to locate and recover any of the lost pipe. The petitioner Great Lakes conducted an aerial search for the lost pipe (TR I-65-66; Pltf's Exs 17,

18, 19 and 20), which resulted in the location and recovery in two sections of the last pipe lost. (Pltf's Ex 22; TR II- 136-37). Subsequently, during the latter part of June, the petitioner was successful in locating and recovering an additional 464 feet of pipe found floating in the ocean in several sections. (Depo-Hansen at 53; Pltf's Ex 23 and 24). All the pipe so recovered was returned to service.

The petitioner Great Lakes filed suit to recover the value of the pipe lost and the costs of searching for and recovering the pipe which was saved. At trial it contended that liability for the loss should fall on the respondent towing company:

- Through application of the *Pennsylvania* Rule[3] presumption of causation predicated upon the respondent's violation of the statutory requirement that its tug be operated by licensed personnel.[4]

- Based upon the respondent's inability to explain the loss given the circumstances which surrounded the occurrences.

- Based upon the opinion of the only expert witness to testify, an experienced tugboat operator, that the loss had been caused by the failure of the respondent to conduct the towing operation with "such reasonable care and maritime skill as prudent navigators employ for the performance of similar services."[5]

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3. *The Pennsylvania*, 86 U.S. (15 Wall.) 125, 136 (1874).

4. 46 U.S.C. § 8904(b) (1997).

5. *Stevens v. The White City*, 285 U.S. 198, 202 (1932).

Notwithstanding a finding that the only explanation attempted to be advanced by the respondent did not explain the loss of the pipe, (App. B at 7-8), judgment was entered for the respondent. On appeal the judgment was affirmed. (App. A).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT WHICH IS RIPE FOR REEXAMINATION AND CLARIFICATION

Sixty-nine years ago this Court decided *Stevens v. The White City*.[6] The decision in *Stevens* is recognized generally as "the seminal case defining the duties and liabilities of the tug engaged under a towage contract. . . .".[7] Various interpretations of *Stevens* by the lower federal courts and their applications of that decision, particularly as it applies to the unmanned tows which make up the bulk of tug-and-tow traffic,[8] have resulted in substantial inter-circuit conflict. In the words of one commentator, . . ." [a] channel of admiralty law is in turmoil."[9] *Stevens* – or more appropriately

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6. 285 U.S. 195 (1932).

7. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 12-4 at 249 (3d ed. 2001). (Copy lodged. *See* Lodging, at L-66).

8. Charles E. Lugenbuhl and David B. Sharpe, *The Law of Towage at the Millennium: What Changes Are Needed?*, 73 TUL. LAW REV. 1811, 1815 (1999). (Copy lodged. *See* Lodging, at L-2, L-6).

9. Joel K. Goldstein, *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium, Towage*, 31 J. MAR. L. & COM. 335 (2000). (Copy lodged. *See* Lodging, at L-23).

its varied, sometimes conflicting treatment in the courts below – now "cr[ies] out for reexamination and clarification. . . ."[10] "It is time to take another look."[11]

The Tulane Admiralty Law Institute is a biannual affair. For forty years hundreds of admiralty practitioners from across the nation have gathered in New Orleans, accompanied by scholars and judges, to address and consider maritime law. In 1999, the symposium focus was "Admiralty Law at the Millennium." One of the areas addressed was the law of tug and tow.

> [A]t the close of this century, this article suggests four **areas of towage law that cry out for reexamination and clarification** in the next century. Those areas are:
>
> (1) The rule announced in 1932 by the Supreme Court in *Stevens v. The White City* that the towing vessel is not the bailee of the towed vessel. . . .[12]

Another commentator takes the position that further consideration of *Stevens* by this Court "is in order."[13]

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10. Lugenbuhl and Sharpe, *supra* note 8, at 1812 (Lodging, at L-3).

11. Goldstein, *supra* note 9, at 337 (Lodging, at L-25).

12. Lugenbuhl and Sharpe, *supra* note 8, at 1812 (emphasis supplied) (Lodging, at L-3).

13. Goldstein, *supra* note 9, at 337 (Lodging, at L-25).

And while Messrs. Lugenbuhl and Sharpe call only for "reexamination and clarification," Professor Goldstein is more emphatic. "It is time for Stevens to go."[14] (It is not the first position of this petitioner that the situation calls for such drastic surgery.)

A. *Stevens and its Legacy of Conflict*

In *Stevens* the tow was a motor boat; the towage was to take her across a harbor. An employee of the tow's owner was put on board just to tend lines at destination. During the voyage the tow, then undamaged, was tied alongside a pier overnight and the employee, with the acquiescence of the tow's owner, went home for the night. He did not return the next morning and towage was resumed without him. Upon the tow's arrival at destination, her hull planking was found to be damaged just above the waterline. No one aboard the tug during the voyage had a clue "when, how, or where the damage happened."[15]

This Court, citing prior decisions, held that a tug is neither a common carrier, an insurer, nor a bailee of her tow.[16]

> The mere fact that the [tow] was in good order when received by [the tug] and in damaged condition when delivered does not raise any presumption of fault.[17]

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14. *Id.* at 351 (Lodging, at L-39).

15. *Stevens*, 285 U.S. at 199-200.

16. 285 U.S. at 200.

17. 285 U.S. at 202.

Nor was there anything "about the injury itself to warrant any inference that it resulted from fault or negligence on the part of the tug."[18]

This Court, in deciding *Stevens*, was not announcing new law or extending old; it was applying what this Court obviously regarded as settled law.[19] *Stevens* relied heavily upon earlier decisions, most importantly *The Steamer Webb*.[20] There it was held

> . . . [While] damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault . . . there may be cases in which **the result is a safe criteria by which to judge of the character of the act which has caused it**. . . . In the present case the departure from the true course was not so great, but it was enough to devolve upon the tug **the duty of explanation**.[21]

Recognizing this four circuits have construed the no-bailment rule in *Stevens*, fully understood, to encompass

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18. 285 U.S. at 203.

19. 285 U.S. at 201, 202-203. *See also* 2 SCHOENBAUM § 12-4, at 249 and n.6 (Lodging, at L-66, n.6).

20. 81 U.S. (14 Wall.) 406, 414 (1871), cited in *Stevens*, 285 U.S. at 200, 203, as well as in a number of other cases which *Stevens* also cites. 285 U.S. at 200. *See* for instance, *The J.P. Donaldson*, 167 U.S. 599, 603 (1897); *The Burlington v. Ford*, 137 U.S. 386, 391 (1890); *Eastern Transportation Line v. Hope*, 95 U.S. (5 Otto) 600, 602 (1877); *The Arturo*, 6 F. 308, 310 (C.C.D. Mass. 1881).

21. 81 U.S. (14 Wall.) at 414 (emphasis supplied).

this duty of explanation. The Fifth Circuit early interpreted *Stevens* to encompass the burden of explanation.[22]

> . . . It is elementary that a tug does not have the liability of a common carrier or an insurer but it is required to use ordinary care and prudence in performing the services. . . . When an accident occurs to the tow the action is ex delicto and the burden is on the tow to show negligence on the part of the tug. However, circumstances may create a strong presumption of negligence. In that event the burden is on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence. The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774; The Clarence P. Howland, 2 Cor., 16 F.2d at 25.[23]

That position has been reasserted, at least twice, by that court.[24]

The Fourth Circuit has interpreted *Stevens* in the same way

> [W]hen an accident occurs under circumstances in which it would not ordinarily have occurred

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22. *Simkins v. R. L. Morrison & Sons*, 107 F.2d 121 (5th Cir. 1939).

23. *Id.* at 122.

24. *Bisso v. Waterways Transportation Co.*, 235 F.2d 741, 744 (5th Cir. 1956) and *King Fisher Marine Service, Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1184 (5th Cir. 1984).

> had the proper care been exercised, there is imposed upon the tug the duty of proving that the proper care was exercised.[25]

The same result, articulated somewhat differently, prevails in the Second Circuit.[26] The Eighth Circuit also recognizes the burden of explanation, however, it does so in conjunction with an application of the doctrine of *res ipsa loquitur*, either co-mingled with or existing separately alongside the duty to explain.[27]

While four circuits recognize a duty of explanation on the part of the tug arising from the circumstances of the loss, cases from three others, the Third, the Seventh, and based upon this case for which review is sought, and one other,[28]

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25. *The Anaconda*, 164 F.2d 224, 228 (4th Cir. 1947). *See also Detyens Shipyards, Inc. v. Marine Industries, Inc.*, 349 F.2d 357 (4th Cir. 1965), *affirming*, 234 F. Supp. 411 (E.D.S.C. 1964); *The Evelyn v. Gregory*, 170 F.2d 899, 901 (4th Cir. 1948).

26. *National Transportation Corp. v. The Tug Abguaig*, 418 F.2d 1241, 1242 (2d Cir. 1969). *See also The Clarence P. Howland*, 16 F.2d 25, 26 (2d Cir. 1962); *Sternberg Dredging Co. v. Moran Towing & Transp. Co.*, 196 F.2d 1002, 1006 (2d Cir. 1952); *Elizabeth Turner, Inc. v. Tug Lucky D*, 941 F. Supp. 439, 442 (S.D.N.Y. 1996).

27. *Lone Star Industries v. May Towing Co.*, 927 F.2d 1453, 1455 (8th Cir. 1991); *Mid-America Transp. Co., Inc. v. National Marine Service , Inc.*, 497 F.2d 776 (8th Cir. 1974).

28. *Natco Limited Partnership v. Moran Towing of Florida*, 11th Cir. No. 99-11798, decided November 9, 2000, (App. E), *rehearing denied*, January 13, 2001 (App. F), *affirming*, M.D. Fla. Case No. 96-00712-CIV-J-21B, decided February 16, 1999 (App. D).

the Eleventh.[29] This defines the inter-circuit conflict, those that recognize that circumstances may give rise to a duty on the part of the tug to explain the loss, and those, like the lower courts here, which apply the no-bailment rule without reference to any such duty.

B. *Stevens Properly Understood*

Stevens is most often cited for the proposition that "under a towage contract the tug is not a bailee of the vessel in tow or its cargo."[30] As such, it is increasingly the target of scholarly criticism. The reasoning employed in it has been termed "formalistic" and unsatisfactory,[31] and as reflecting a "lack of knowledge of the towing business."[32]

Lugenbunl and Sharpe raise the question whether in continuing the no-bailment standard *Stevens* was correctly decided. ". . . [D]oes *Stevens* correctly define the real relationship between the tug and its tow?"[33] They then note that "the courts apply bailment on a regular basis in land-based situations where the degree of control exercised by the bailee is equal to or less than that exercised by a tug,"[34] and they go on to answer their own question:

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29. *The Bellatrix*, 114 F.2d 1004, 1007 (3d Cir. 1940); *American Bridge Division, U.S. Steel Corp v. Roen S.S. Co.*, 328 F.2d 838, *affirming*, 216 F. Supp. 353 (E.D. Wisc. 1963) .

30. 285 U.S. at 200.

31. Goldstein, *supra* note 9, at 340 (Lodging, at L-28).

32. Lugenbuhl and Sharpe, *supra* note 8, at 1814 (Lodging, at L-5).

33. *Id.* at 1815 (Lodging, at L-6).

34. *Id.* at 1817 (Lodging, at L-8).

> . . . [T]his continued attack on the fundamental premise of *Stevens* ought to make the courts realize that the relationship of a tug to its tow is fundamentally that of a bailee, one to whom another has extended the care, custody [however limited], and control of the [tow]."[35]

The thrust of Professor Goldstein's critique is to the same effect.[36] To a large extent, these criticisms are founded in what is commonly regarded as the failure of *Stevens* to distinguish between manned and unmanned tugs. "Since *Stevens*, the lower federal courts have struggled with the towage-is-not-bailment rule, especially as it applies to unmanned tows, which make up the majority of tug-and-tow traffic today."[37]

Judge Learned Hand, in the decision *Stevens* affirmed,[38] clearly had perceived a distinction insofar as bailment is concerned between manned and unmanned tows.

> . . . [I]f free to choose we should follow the decision below [which imposed a bailment-based presumption of negligence]. . . . Our own decisions seem to us, however to have too strongly established [the rule that towage is not a bailment] to justify a departure now. Whether this has arisen

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35. *Id.* at 1817-18 (Lodging, at L-8, L-9).

36. Goldstein, *supra* note 9, at 347 (Lodging, at L-35).

37. Lugenbuhl and Sharpe, *supra* note 8, at 1815 (Lodging, at L-6).

38. *The White City*, 48 F.2d 557 (2d Cir. 1931).

> from confusing an ordinary towage contract, where the owner of the tow remains in possession, with a contract like this where the tow is unmanned or manned only by a bargee, we cannot tell. Probably the doctrine generally applicable was carried over to this situation without observing the differences; so far as it appears, the anomaly has not hitherto been observed.[39]

This Court, however, did not address that aspect in its *Stevens* decision. Whether it considered it and rejected it is not known. Professor Goldstein thinks the distinction or at least its implications were overlooked in the decisional process;[40] possibly this Court perceived the tow involved in *Stevens* to have been manned at the time of initial delivery for towing and regarded its status so fixed as of that moment. The failure to address this, however, clearly accounts for at least some of the difficulty the lower courts have experienced in applying *Stevens*.[41]

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39. *Id.* at 558.

40. Goldstein, *supra* note 9, at 341-344 (Lodging, at L-29 to L-32).

41. At least one state court has refused to apply the no-bailment rule of *Stevens* where the tow was unmanned. *American Tug Boat Co. v. Washington Toll Bridge Authority*, 48 Wash. 2d 117, 291 P.2d 668, 670-71 (1956), citing as authority this Court's decisions in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), as well as its affirmance of an Illinois decision holding the tower of a raft of logs to be a bailee as at common law. *Knapp Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900), *affirming*, 178 Ill. 107, 52 N.E. 895 (1899). "The cited case [*Stevens*] has no application where, as here, the tug had exclusive possession and control of a 'dumb' tow." *American Tug Boat*, 291 P.2d at 670.

What the critics appear not to have recognized, or recognizing not to have given appropriate weight,[42] is that in deciding *Stevens* this Court was applying what it regarded as settled precedent. That settled precedent included the longstanding proposition that not withstanding the lack of a bailment, the circumstances surrounding a casualty can "devolve upon the tug the duty of explanation."[43] That a tow is not manned, or is manned only by a bargee, is such a circumstance, as is a situation where "the tow had no power to show what in fact caused the disaster, [while] if the tug had done her duty, the cause would probably have been disclosed."[44]

The effect of *Stevens* is summarized by a leading authority on maritime law:

> Despite [the *Stevens v.*] *The White City* rule that no presumption of negligence arises in a towing situation merely because the tow or cargo is lost or delivered in a damaged condition, the proof of an occurrence, accident, or damage that would not ordinarily occur, places the tug under an obligation to make some satisfactory explanation or reasonable excuse for the damage. This duty arises particularly in cases involving the damage to an unmanned vessel. The rule of *THE WHITE CITY*

42. Goldstein, *supra* note 9, at 351 (Lodging, at L-39). "Stevens itself leaves some leeway. After affirming in every way imaginable that towage is not a bailment, Justice Butler noted that '[t]here is nothing about the injury itself to warrant any inference that it resulted from fault or negligence on the part if respondent.' "

43. *The Steamer Webb*, 81 U.S. (14 Wall.) at 414.

44. *Sternberg Dredging*, 196 F.2d at 1006.

> has little persuasive power where the tow is unmanned. Where the duty of explanation is applied, the burden of proof of negligence is still upon the plaintiff; it is just that the burden is satisfied by evidence of an occurrence or damage that is inconsistent with proper towage coupled with a failure of explanation by the tug.[45]

In doing so, Professor Schoenbaum clearly approves of the view taken by the majority of the circuits which have considered the question, as best expressed by the Fifth Circuit.[46]

C. *Conflict Arising from the Decision Below*

The decision below fails to properly construe *Stevens* in defining the duties and liabilities of the tug here involved and applying them in this case. As a result, the decision below conflicts with *Stevens* as that case is properly understood. In addition, the decision below conflicts with decisions in those circuits which properly construe the seminal decision of this court on an important issue of maritime law.

In the present case there were circumstances which mandated that the respondent tug owner explain the loss, *i.e.*, assume the burden of explanation which *Stevens*, properly understood, attaches to such a situation.

- The tow was unmanned.
- The two operators who split the watchstanding duties were unsure which was the master in overall charge of the tug.

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45. 2 SCHOENBAUM, § 12-4 at 252.

46. *Simkins*, 107 F.2d at 121-22.

- Neither of these two operators was properly licensed, such that the tug was being operated in violation of the law.

- Before getting underway, the respondent towing company recognized that the raft was a "fragile tow," (Tr1-175) which was not to be towed in seas greater than five feet, as such would have a propensity to damage the tow. Notwithstanding this, the tug took the tow into such waters, even though such seas had been forecasted some twenty (20) hours in advance of being encountered.

- The tug deviated from and failed to follow routing directions which would have had the tow closer to shore in calmer waters.

Notwithstanding this, the courts below expressly refused to recognize and consider the resulting duty of explanation. (App. B at 11). Had they done so, petitioner and not respondent would have prevailed, for the respondent towing company failed to meet its burden of explanation. (App. B at 7-8). As a consequence, this case constitutes an ideal vehicle for this Court to reexamine its ruling in *Stevens* and to make such clarification and/or changes as, after consideration on the merits, are indicated.

II.

THE ISSUE GIVING RISE TO THE CONFLICTS IS BOTH IMPORTANT AND TIMELY AND MERITS THIS COURT'S CONSIDERATION

Sixty-nine years ago this Court decided *Stevens*. Various circuits have read the decision differently. Early on the Fifth Circuit saw *Stevens* as bringing forward the authority upon which in deciding it this Court relied, such that circumstances could cast on the tug the duty of explanation.[47] Other circuits, including by this case the Eleventh, have applied the no-bailment rule unconditionally such that negligence on the part of the tug can be established only by affirmative[48] proof, without the aid of either inference or presumption.

The decades have come and gone and the conflict persists, with the following results:

- Reputable legal scholars openly question whether *Stevens* was decided correctly,[49] "this continued attack on the fundamental premise of *Stevens*[50]
- The lower courts, compelled by fairness and justice "have struggled under *Steven's* constraints . . . ,"[51] and have resisted it.[52]

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47. *Simkins*, 107 F.2d at 121.

48. App. B at 9.

49. Lugenbuhl and Sharpe, *supra* note 8, at 1815 (Lodging, at L-6); Goldstein, *supra* note 9, at 335-347 (Lodging, at L-23 to L-35).

50. Lugenbuhl and Sharpe, *supra* note 8, at 1817 (Lodging, at L-8).

51. Lugenbuhl and Sharpe, *supra* note 8, at 1817 (Lodging, at L-8).

52. Goldstein, *supra* note 9, at 337 (Lodging, at L-25).

- The duty of explanation, along with other concepts whereby a tug has been faulted, have been characterized as "incursions on the rule" of *Stevens*[53] and crafted circumstances[54] which while fair[55] have today made the rule "hollow."[56]

"The seminal case defining the duties and liabilities of the tug engaged under a towage contract is Stevens v. The White City."[57] It is the analytical foundation upon which the law of tug and towage presently is built, by which relationships are evaluated, and disputes, when they arise, resolved. As such, it is an extremely important component of the maritime law as to which, absent specific Congressional intervention, this Court is the final declarant.

One does not have to agree completely with all that the scholarly comments contain to perceive that a fundamental problem exists with the state of the decisional law, significantly impacting this important part of the maritime law. It is a problem which has existed for a substantial period of time, and the resulting conflict and confusion have not

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53. Chester D. Hooper & Jeanne-Marie D. Van Hemmen, *Burdens of Proof Between Tugs & Tows*, 70 Tul. Law Rev. 531 (1995), as cited, Lugenbuhl and Sharpe, *supra* note 8, at 1816 (Lodging, at L-7).

54. Goldstein, *supra* note 9, at 337 (Lodging, at L-25).

55. Lugenbuhl and Sharpe, *supra* note 8, at 1817 (Lodging, at L-8).

56. *Id.* at 1817.

57. 2 SCHOENBAUM, § 12-4 at 249 (Lodging, at L-66). The characterization of *Stevens* as "seminal" appears judicially in *Hercules, Inc. v. Stevens Shipping Co.*, 698 F.2d 726, 732 n.25 (5th Cir. 1983).

been susceptible to resolution at the circuit level. The problem is centered in a decision of this Court which only the authority of this Court can resolve.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 5, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12661

D.C. Docket No. 97-01155-CIV-ORL-19B

GREAT LAKES DREDGE & DOCK CO.,
a corporation,

Plaintiff-Counter-Defendant-Appellant,

versus

BEYEL BROTHERS, INC.,
a corporation,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(March 5, 2001)

Before BIRCH and HULL, Circuit Judges, and O'NEILL*,

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* Honorable Thomas N. O'Neill, Jr., U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) the judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, IN ADMIRALTY DATED APRIL 20, 2000 AND FILED APRIL 25, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
IN ADMIRALTY

Case No. 97-1155-CIV-ORL-19B

Judge Ann Aldrich

GREAT LAKES DREDGE & DOCK CO.,

Plaintiff,

vs.

BEYEL BROTHERS, INC.,

Defendant.

MEMORANDUM AND ORDER

This action was brought by Great Lakes Dredge & Dock Company ("Great Lakes") for damages and indemnification due to the loss of, or damage to, dredge pipes, which occurred while the pipe was under tow by the tug Dorothy McAllister. Beyel Brothers, Inc., the owner and operator of the Dorothy McAllister disputes these claims and has counterclaimed for an amount it contends Great Lakes owes it for towage services which it claims the Dorothy McAllister performed.

Appendix B

This case is within the admiralty and maritime jurisdiction of this Court under Article III Section 2 of the United States Constitution, and 28 U.S.C. § 1333(1). Following a bench trial on January 18-20, 2000 and extensive briefs by the parties, this Court now makes the following Findings of Fact and Conclusions of Law, pursuant to Fed.R.Civ.P.52.

I. Findings of Fact

Plaintiff Great Lakes Dredge and Dock Company ("Great Lakes") is a New Jersey Corporation with its principal place of business in Illinois. Great Lakes is one of the world's largest dredging contractors and has significant expertise in dredge pipe use and maintenance. Defendant Beyel Brothers is a Florida corporation that provides towing services.

A. The pipe

In early March 1997 Great Lakes contacted Beyel Brothers to arrange for the towing of five pieces[1] of dredge pipe from Port Canaveral, Florida, to Wilmington, North Carolina. The pieces of pipe ranged in length from approximately 690 to 800 feet and were tied or lashed together by Great Lakes to form a make-shift raft. The pipe belonged to Weeks Dredging Company ("Weeks"), a non-party to this action. Great Lakes borrowed the pipe from Weeks in 1995 and it was in Great Lakes's possession at all times prior to its loss at sea.

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1. Beyel Brothers maintains that there were only four pieces of pipe and the evidence on this point was not conclusive. This court finds that, more likely than not, there were five pieces of pipe.

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Great Lakes used the pipe for various projects in 1995-1996 and, in April of 1996, rafted the pipe together and towed the pipe from Hutchinson Island, Florida to Green Cove Springs, Florida. The raft of pipe remained in Green Cove Springs until early February of 1997, when Great Lakes had it towed to Cape Canaveral in anticipation of its use for a beach renourishment project. However, that project was canceled and Great Lakes decided to use the pipe on a project in Wilmington, North Carolina. From February 7, 1997, until the towing project eventually began on April 20, 1997, the pipe was moored offshore adjacent to Beyel Brothers' property and was subjected to tidal changes that may have damaged the pipe and, more likely than not, weakened the raft. In any event, the evidence is undisputed that, during this entire time period, the raft of pipe was not closely inspected by any personnel from Great Lakes or by any person with expertise in rafting pipe.

B. The agreement

Tim Burke, a buyer for Great Lakes, represented Great Lakes in negotiating the towing contract. Danny Beyel, Sr. primarily represented Beyel Brothers. Burke and Beyel discussed various options for towing the pipe. Beyel told Burke that the safest way to transport the pipe would be up the Atlantic Intra coastal Waterway ("AIWW"), a long series of canals running up the eastern seaboard. Beyel quoted Burke a price of $60,000 for the job, which would require two tug boats and would also require that the raft be towed approximately 50 miles in open water to reach the first acceptable lock. Burke rejected this proposal as too expensive.

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Eventually, the parties orally agreed that Beyel Brothers would tow the pipes in the ocean, up the coast, using the tug Dorothy McAllister. Beyel quoted Burke a price of $3,000 per day for the tow and Burke estimated that the tow would take ten days, five days out and five days back. The parties came to an understanding that the tug would, if possible, avoid seas in excess of five feet, as such seas had the potential to damage the pipe; however, it was also understood between the parties that favorable weather could not be guaranteed and that, despite all precautions, the tug and tow might be exposed to seas in excess of five feet. The parties further agreed that the tug would wait for favorable weather forecasts before departing and, once underway, would proceed from Port Canaveral to the vicinity of Fernandina Beach, at which point the weather forecasts would be reevaluated. There was an entrance to the AIWW at Fernandina Beach that the tug could have used if necessary.

On March 25, 1997 Great Lakes faxed the first page of a purchase order to Beyel Brothers memorializing the agreement. The remaining pages of the purchase order, a multi-page standardized form used by Great Lakes which included a page of "terms and conditions," were not faxed to Beyel Brothers and Beyel Brothers never received anything other than the faxed first page. The faxed order stated that the price was $3,000 per day and estimated the time needed to be ten days. The order also indicated that the tug was to proceed "coastwise as directed." In their oral agreement, Burke and Beyel agreed that the tug should proceed "coastwise"; however, they did not discuss exactly what this term meant. Further, Burke admitted that the phrase "coastwise as directed" did not, and was not intended, to

have any specific meaning. Evidence indicated that "coastwise" could be anywhere between Coast Guard regulations defining it is 200 miles off shore to the NOAA definition of up to 50 miles off shore. This Court finds that there was no meeting of the minds as to how close to shore the tow had to be in order to be "coastwise".

After the Dorothy McAllister got underway, Beyel Brothers mailed a job invoice to Great Lakes on April 21, 1997, that included an unsigned copy of Great Lakes's "Vendor's Acknowledgment" that Beyel Brothers had retained after previous dealings with Great Lakes (the parties have done business in the past and continue to do so). The "Vendor's Acknowledgment" form, which includes Great Lakes's terms and conditions on the reverse side, clearly states that it must be signed to be valid.

C. Ocean conditions

As indicated above, the Court finds that there is no standard, agreed upon maritime definition of "coastwise", and definitions range from 50 to 200 miles offshore. Even with modern weather forecasting, conditions at sea can be unpredictable. More often then not, seas will be calmer closer to shore and rougher farther from shore. However, this is by no means an absolute and it is entirely possible for seas to be very high 10 miles offshore and be calm 100 miles offshore at the same point in time. Further, if a sudden storm arrives, even 10 miles may be too far offshore to avoid seas in excess of five feet.

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D. The Dorothy McAllister

The tug Dorothy McAllister was equipped with two VHF radio transmitters and a cellular telephone. Its communications range was approximately 20-40 miles offshore. Onboard as crew were Bruce Anderson, Charles Etheridge, Stanley Kahn and John Hodgen. Anderson and Etheridge were the two watch standing crewmen, and each was under the impression that the other was the master of the tug. Neither Anderson nor Etheridge was properly licensed to serve as master at that point in time; however, both were fully qualified to perform that role. The logbook for the Dorothy McAllister was lost prior to trial and was not produced at trial in any form. In the absence of the logbook, this Court has resolved disputes where the logbook may have provided enlightenment in favor of Great Lakes. *See The Earnest H. Meyer*, 84 F.2d 496, 503-04 (9th Cir. 1936).

E. The intervening period

On March 27, 1997, Great Lakes notified Beyel Brothers that there was a delay in their Wilmington project and told Beyel Brothers not to tow the pipe until notified. At some time in early April, Great Lakes notified Beyel Brothers that they could tow the pipe. Weather forecasts, however, were unfavorable, and the Dorothy McAllister did not get underway until April 20, 1997, when the weather appeared to be favorable. Prior to departure, Bruce Anderson visually examined the raft of pipe for obvious defects and did not observe any.

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F. The voyage of the Dorothy McAllister

The Dorothy McAllister left Cape Canaveral on Sunday April 20, 1997, heading towards the general vicinity of Fernandina Beach. When the Dorothy McAllister left, Anderson and Etheridge planned to take the tug to Fernandina and possibly enter the AIWW at that point. At some time on Sunday evening, in the vicinity of Flagler Beach, about halfway between Cape Canaveral and Fernandina, Bruce Anderson contacted Richard Spurlock. After discussing their position and weather forecasts, the decision was made to continue on in the direction of Charleston, South Carolina (which is south of, and on the way to, Wilmington) and not to stop at Fernandina. By all accounts, the weather forecasts at this time were favorable.

After changing course to head towards Charleston, the Dorothy McAllister's straightline course took her further and further offshore due to the curvature of the coastline. At all times, however, the Dorothy McAllister was at least within communications range (40 miles) at 7:01 a.m. and 2:36 p.m. on Monday, April 21, as the Dorothy McAllister placed calls to Beyel Brothers using the ships VHF capability.

The curve of the coastline from Cape Canaveral to Charleston is like a "C." The curve is not as severe as a "C," and a "(" is more representative. Roughly speaking, Cape Canaveral is at the bottom of the curve and Charleston at the top of the curve. Flagler Beach is approximately half-way between Cape Canaveral and Fernandina. Thus, to go from Cape Canaveral to Fernandina, unless one went out of one's way, the most logical course would be to follow the natural

curve of the coastline. Since Anderson testified that he initially expected to enter the AIWW at Fernandina, it is logical to assume that this was the path to Fernandina. This is further corroborated by the fact that it appears that the Dorothy McAllister did follow the natural curve of the coastline in its way to Flagler Beach.

However, once the decision was made at Flagler Beach to proceed directly to Charleston, the most direct route became a straight line which did not follow the natural curve of the coastline. Such a course, by basic geometry, would result in the Dorothy McAllister getting farther and farther off shore, as the mid-point of the journey was approached. This Court finds that the Dorothy McAllister changed course at a point just north of Flagler Beach, approximately 10-15 miles from shore, and followed a direct line course to the Charleston Racon Buoy. Based on the expert testimony of Russell McVay, this would have put the Dorothy McAllister at times more than 70 miles from shore.

At 3:01 a.m. on Monday, April 21, 1999, the National Weather Service, Miami, issued a coastal marine forecast covering the area in which the Dorothy McAllister would be traveling over the next 24 or more hours. The forecast issued a small craft advisory indicating that seas would be three to five feet during the day. For the night, the forecast indicated that seas would be four feet close to shore and seven feet well offshore (the forecast's range was 50 miles). The forecast called for three to five feet seas on Tuesday. Other than evidence as an exhibit, there was no testimony on this forecast, so it is not known if the crew of the Dorothy McAllister were aware of it and, if aware, whether they took

it into consideration.

The trip was uneventful until sometime late Monday evening, April 21, or early Tuesday morning, April 22, when the Dorothy McAllister lost two or three pieces of pipe. Exactly when the pipe was lost is not certain. Further, it is not known how the pipe was lost. One theory is that the pressure on the pipes caused by the undulating actions of high waves caused some of the pipe to break into pieces. Another theory is that the raft was not properly lashed together because of the pressures exerted on the raft during the long period of time during which it was tied together and subjected to tidal pressure at Cape Canaveral. Another theory is that the pipe broke, but that the pipe had been weakened by its long exposure to tidal pressures and therefore, broke in water that would normally not be rough enough to break the pipe. The evidence presented at trial did not indicate that, more likely than not, any particular one of these theories explains the loss of the pipe.

The weather was rough at the time of the first loss of pipe, but not excessively so and was consistent with the marine forecast described above. The various crewmen estimated the seas to be between four and ten feet during the periods of rough weather. Based on this Court's review of the available testimony in this regard, this Court finds that the waves did not likely exceed seven feet. How far offshore the tug was when the loss of pipe occurred is not known, but this Court finds that it was more than 40 miles and perhaps as far as 70 to 80 miles offshore.

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G. Events following the first loss of pipe

Once the crew of the Dorothy McAllister discovered that they had lost some of the pipe, they made a sweep of the area to see if they could find any of the pipe. Not spotting any of the pipe, the crew presumed that the pipe had sunk and continued on. Due to miscommunication between the parties, Great Lakes dispatched another tug to assist the Dorothy McAllister at a spot where Great Lakes believed the Dorothy McAllister to be waiting. The two tugs never made contact.

At some time either late Tuesday night or early Wednesday morning, more pipe was lost. When the Dorothy McAllister eventually arrived in Wilmington, only one piece of pipe remained. Over the course of the next few days, Great Lakes was able to locate and recover two pieces of pipe of approximately 800 feet in total length. In June of 1997, Great Lakes recovered another 644 feet of pipe.

II. Conclusions of Law

Great Lakes pursues its claim against Beyel Brothers on a theory of negligence and of breach of contract. This Court finds that neither claim has merit.

A. Negligence

Recovery under a general towing contract must be based on negligence and the burden is on Great Lakes to show that Beyel Brothers was negligent in providing towing services. *See Stevens v. White City*, 285 U.S. 195 (1932). The fact

that the Dorothy McAllister did not arrive at her intended destination with her tow intact does not, by itself, raise an inference of negligence; Great Lakes must affirmatively show that Beyel Brothers was negligent.

1. The Pennsylvania Rule

This Court has found that Etheridge and Anderson did not have proper licenses when the Dorothy McAllister made her ill-fated journey. Great Lakes argues that this statutory violation raises a presumption of negligence under the Pennsylvania Rule. This Court ruled at trial that the Pennsylvania Rule did not create a presumption of negligence in this case.

Under the Pennsylvania Rule, a statutory violation by a vessel creates a presumption of negligence and the violating party must demonstrate that the violation could not have been one of the causes of the of the accident. *See The Pennsylvania*, 86 U.S. 125 (1873); *Candies Towing Co., Inc. v. M/V B & C Eserman*, 673 F.2d 91, 93 (5th Cir. 1982). In this case, the statutory violation could not have caused the loss of pipe, because there is no causal connection between the violation and the loss. *See Associated Dredging v. Continental Marine Towing*, 617 F.Supp. 961, 967-68 (there must be a causal connection between the violation and the loss for the Pennsylvania Rule to apply).

Great Lakes argues that the purpose of the license is to promote safe navigation. This Court agrees and finds that the lack of a license creates a presumption that the controllers of the Dorothy McAllister were not qualified to operate the

ship. If this Court's ultimate finding were that the crew of the Dorothy McAllister were not qualified to operate the ship, this would shift the burden to Beyel Brothers to prove that the crew's inexperience did not cause the loss of pipe. However, Beyel Brothers put forth uncontroverted evidence that both Etheridge and Anderson were fully qualified to operate towing vessels. Indeed, Great Lakes's expert witness agreed that they were qualified. Since this Court finds that the Dorothy McAllister's crew was qualified to operate the Dorothy McAllister, this removes any presumption under the Pennsylvania Rule based on the lack of a proper license.

In *The Pennsylvania* two ships crashed in the fog. One of the two ships was not properly operating its fog horn. The evidence was unclear as to how the accident was caused, but the Court held that the ship without the fog horn was presumptively negligent and that it had failed to prove that the lack of the fog horn could not have caused the accident. *The Pennsylvania*, 86 U.S. 125 (1873). It is clear that the lack of a fog horn could directly cause a collision in dense fog. The lack of a license, however, cannot directly cause dredge pipe to break-up at sea. Granted, however, improper, or inexperienced, seamanship could have caused the loss of pipe, and the lack of a license might indicate improper seamanship. This Court finds that the only logical way to apply the Pennsylvania Rule in a case like this is to hold that the lack of a license creates a presumption of an unqualified seaman. But, of course, having a license does not necessarily mean that one is a truly qualified seaman, nor does not having a license demonstrate that a seaman is unqualified (especially when, as the case is here, the license in question is fairly easy to obtain, akin to the written portion

of a driver's license test). Since Beyel Brothers proved that their seaman were qualified, any presumption caused by the Pennsylvania Rule drops from the case. The lack of a license did not, and could not, have caused the loss under the facts of this case.

2. General negligence

Great Lakes also argues that it was negligent for the Dorothy McAllister to travel as far offshore as it did, that this negligence caused it to encounter excessively high seas, and that the high seas caused the loss of the pipe. This Court rejects that argument first because Great Lakes did not demonstrate that the loss of pipe was caused by exposure to excessively high seas. Further, Great Lakes did not demonstrate that Beyel Brothers acted negligently. Consequently, Great Lakes has not met its burden of proving that the loss of pipe was caused by Beyel Brothers's negligence.

This Court finds that Great Lakes did not demonstrate that the loss of pipe was caused by exposure to excessively high seas. The only expert to testify in this regard was Captain McVay for Great Lakes. However, this Court did not find McVay to be especially qualified when it came to the structure of dredge pipe and the types of forces that would cause it to break. McVay is a very qualified seaman and tugmaster; however, that has little to do with the structure of dredge pipe. This Court founds McVay's testimony to be the opinion of an experienced seaman, not a definitive statement on what seas dredge pipe can withstand.

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McVay testified that the dredge pipe in question[2] would not break-up in five foot waves, but that it was doomed in seven to eight foot waves. Beyond this testimony, Great Lakes did not provide any substantive evidence to indicate that seas in excess of five feet would "doom" towed dredge pipe. In contrast to McVay's testimony, is this Court's finding that Great Lakes, which is an expert on dredge pipe, knew that its pipe might very realistically be exposed to seas in excess of five feet. By all accounts, the weather faced by the Dorothy McAllister was bad, but not excessively so and certainly not anything out of the ordinary. While Great Lakes expressed a preference that the pipe not be exposed to seas in excess of five feet, Great Lakes did not exact a guarantee from Beyel Brothers that the pipe would not be so exposed, nor express concern to Beyel Brothers that waves of seven to eight feet would doom the pipe.[3]

Further, exposure to excessively high waves is not the only possible cause of the loss of pipe in this case. A more likely cause was the unseaworthiness of the raft itself.[4] The

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2. Even if this Court found McVay qualified to testify as an expert on the forces normal dredge pipe can withstand, which it did not, Great Lakes did not produce any evidence to indicate that this dredge pipe would be as strong as "normal" dredge pipe. In contrast, Beyel Brothers produced evidence indicating that the dredge pipe and raft, more likely than not, had been internally weakened by tidal pressures prior to the voyage.

3. Between the two parties, Great Lakes is unquestionably the more knowledgeable party when it comes to dredge pipe in general and to towing dredge pipe.

4. Great Lakes has questioned whether the concept of
(Cont'd)

raft of pipe had sat for months before the Dorothy McAllister's departure and had been exposed to tidal pressure.[5] This may have weakened the pipes, and more likely than not, the raft itself, or the fastenings that formed the pipe into a raft. No person from Great Lakes had closely inspected the raft since it had been towed in February of 1997. Bruce Anderson did a cursory inspection prior to departure, which is all that is required of the tower. *See Nat G. Harrison Overseas Corp. v. American tug TITAN*, 516 F.2d 89, 94 (5th Cir. 1975) (tug has no responsibility to make a detailed examination of what it will be towing; it is the responsibility of the towee to produce a seaworthy tow). Based on the evidence presented to this Court, it is more likely that the pipe was lost because the raft was not properly rafted, or because the pipe was already too weak to withstand the voyage, than that the loss was caused by Beyel Brothers exposing the pipes to extraordinarily high seas.

(Cont'd)
"seaworthiness" can be applied to a raft of pipe. To the extent that the term "seaworthy" has specific meaning in the context of self-propelling vessels, Great lakes may have a point. However, Great Lakes clearly and unquestionably had the responsibility to present to Beyel Brothers something that could adequately float in the water and withstand the normal and foreseeable wear and tear caused by ocean towing. *See Nat G. Harrison Overseas Corp. v. American tug TITAN*, 516 F.2d 89, 94 (5th Cir. 1975). For the purpose of this order, that is how this Court defines "seaworthy" in reference to the raft of pipe.

5. Beyel Brothers put forth convincing testimony that at low tide the pipe may have been partially on land and partially floating at sea, which would put pressure on the pipe and the raft similar to the effect of high seas.

But even if the loss was solely caused by exposure to seas that were too rough, this Court does not find that Beyel Brothers was negligent in its towing operations. First, pipe is apparently often safely towed in open water. Second, this Court does not find that Great Lakes explicitly warned Beyel Brothers to stay within a certain distance from shore, or request that they do so.[6] Third, this Court is not convinced that, even if this Court were to find that 70-80 miles offshore is inherently unsafe for dredge pipe, which it does not based on this evidence, that Beyel Brothers should have independently known that such a distances from shore is inherently unsafe. There was no evidence set forth indicating that it is common knowledge amongst towers that there is a certain distance offshore within which dredge pipe must be towed. Finally, Great Lakes did not demonstrate that the Dorothy McAllister's chosen path was negligent.

Approximately half way between Cape Canaveral and Fernandina Beach, at some time on Sunday evening, the Dorothy McAllister, in consultation with Richard Spurlock back at Beyel Brothers's office, made the determination, based on the available weather reports, to head towards the Charleston Racon buoy. Great Lakes placed in evidence a Monday morning weather report which forecasted weather consistent with the weather the Dorothy McAllister eventually faced. However, Great Lakes did not inquire into what effect, if any, this weather report made on the Dorothy McAllister's travel line. Indeed, there was no testimony on this weather report at all.

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6. See also discussion, *infra*, regarding the contract formed between the parties.

The existence of this weather report alone is not sufficient to demonstrate that Beyel Brothers's decision to follow a roughly direct line path from Flagler Beach to Charleston Racon was negligent. When the determination was made, the weather forecasts were favorable by all accounts and Beyel Brothers may have made the determination (after waiting weeks for any break in the weather) to take the shortest path in hopes of finishing the journey in favorable weather. Certainly the unfavorable weather forecast, make after that determination had been reached, causes this Court to pause; however, Great Lakes did not elicit any testimony on how this forecast impacted Beyel Brothers strategy, if at all. In fact, Great Lakes admits, in their Post-Trial Proposed Findings of Fact and Conclusions of Law, pg. 46, fn. 18, that deciding whether or not to proceed because of this weather report "would have been a close call." Consequently, this Court does not find, based on the evidence presented, that Beyel Brothers's decision to take a beeline path from Flagler to Charleston was inherently negligent, and even if it was, Great Lakes has not demonstrated that such negligence necessarily caused the loss of pipe.

Finally, Great Lakes also alleges that Beyel Brothers was negligent in their failure to stand by after the pipe was lost and that this caused Great Lakes expense in sending another tug out to where it thought the Dorothy McAllister would be waiting and also led to the loss of additional pipe. However, the evidence produced at trial on these points was so minimal, that this Court cannot find that Great Lakes has met its burden in this regard. Consequently, this Court finds that Great Lakes has not met its burden of showing that negligence by Beyel Brothers led to the loss of pipe or any other expenses incurred by Great Lakes.

Appendix B

B. Breach of contract

Great Lakes also alleges a breach of contract claim against Beyel Brothers. While a general contract for towing sounds under tort, not contract, law, parties are, of course, free to form more specific contracts and impose contractual obligations on themselves. Great Lakes argues that Beyel Brothers had a contractual obligation to take the Dorothy McAllister to Fernandina Beach before assessing weather reports and deciding whether or not to continue on, and that Beyel Brothers breached this contractual obligation, and that the breach caused the loss of pipe.

This Court finds that Beyel Brothers and Great Lakes formed an oral contract through their representatives Danny Beyel Sr. and Tim Burke. Great Lakes memorialized the contract in writing in the fax sent to Beyel Brothers. The parties agreed that Beyel Brothers would use the tug Dorothy McAllister to tow a raft of Great Lakes dredge pipe from Cape Canaveral, Florida to Wilmington, North Carolina and that the Dorothy McAllister would proceed "coastwise as directed." The parties did not have any specific intended meaning of the phrase "coastwise as directed," and this Court interprets it as meaning that the tug should travel up the coast, maintaining a reasonable distance to shore. The parties also agreed that Beyel Brothers would receive a rate of $3,000 per day for the towing. This Court finds that this is the extent of the contract formed between Great Lakes and Beyel Brothers.

Both parties have additionally argued that the other party contractually agreed to a set of standardized "terms and

conditions" set forth on each party's standard form contracts. This Court rejects both parties' proposed inclusions. Since this Court finds that Great Lakes merely faxed the cover page of their standard six page form document and never mailed the complete document, Beyel Brothers did not receive Great Lakes's terms and conditions. Further, no standardized "terms and conditions" were discussed between Burke and Beyel, and this Court finds that there was no meeting of the minds in that regard. Beyel Brothers claim that the contract includes their terms and conditions, part of the invoice mailed out after the Dorothy McAllister got underway and not received by Great Lakes until after the pipe was lost. This claim is equally without merit.

While this Court finds that Burke and Beyel came to a general understanding that the Dorothy McAllister would head towards Fernandina Beach and make a determination based on weather conditions, this Court does not find that Beyel Brothers contractually agreed to proceed all the way to Fernandina before making such a determination. Similarly, the parties did not contractually agree to any set distance from shore that the Dorothy McAllister could travel. Based on this Court's understanding of the meaning of "coastwise", this Court finds that Beyel Brothers did not breach its contract by taking the Dorothy McAllister too far offshore. Finally, this Court does not find that Beyel Brothers contractually agreed to avoid seas in excess of five feet. Consequently, there was no breach of contract by Beyel Brothers.

C. Beyel Brothers Counter Claim

The Court, having concluded that Great Lakes' claims are without merit, turns to Beyel Brothers' claims for towage

fees. There being insufficient evidence for this Court to find that Beyel Brothers deviated from the applicable duty of care owed by a tower, this Court finds that Beyel Brothers are entitled to towage fees.

As set forth above, the only meeting of the minds with respect to the "contract" between the parties was for a fee of $3000 per day, estimated at not more than 10 days. The evidence is undisputed that the round trip took no more than six days. The evidence is also undisputed that Great Lakes was not invoiced with a bill for the contract of towage until April 28, 1997, and that payment was not expected by Beyel Brothers until May 28, 1997. Pre-judgment interest will be awarded based on the average of the 52-Week United States Treasury Bill rate for the applicable period.

III. Conclusion

This Court concludes that Great Lakes has not proved its claims for damages and indemnification.

This Court orders Great Lakes to pay to Beyel Brothers the sum of $18,000 in towage fees, plus pre-judgment interest from May 28, 1997, in the amount of $2,868.10, for a total damage award of $20,868.10. Pre-judgment interest was calculated averaging the auction rate of the 52-Week United States Treasury Bill, as set forth in a monthly basis in 28 U.S.C. § 1961, over the applicable period and compounding the interest on an annual basis. For the year 2000, the Court awarded interest for one-third of the year.

This order is final and appealable.

Appendix B

IT IS SO ORDERED in Tampa, Florida, on this 20th day of April, 2000.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 7, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-12661-FF

GREAT LAKES DREDGE & DOCK CO.,
a corporation,

Plaintiff-Counter-
Defendant-Appellant,

versus

BEYEL BROTHERS, INC.,
a corporation,

Defendant-Counter-
Claimant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: BIRCH and HULL, Circuit Judges, and O'NEILL*, District Judge.

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* Honorable Thomas N. O'Neill, Jr., U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix C

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D — EXCERPTS FROM MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION IN *NATCO LIMITED PARTNERSHIP v. MORAN TOWING OF FLORIDA, INC., et al.* DATED AND FILED FEBRUARY 16, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 96-712-CIV-J-21-B

NATCO LIMITED PARTNERSHIP,
a limited partnership,

Plaintiff,

v.

MORAN TOWING OF FLORIDA, INC., a corporation;
M. D. MOODY & SONS, INC., a corporation; and
MOBRO MARINE, INC., a corporation,

Defendants.

MEMORANDUM ORDER

This is a declaratory judgment action, in admiralty, brought by Plaintiff Natco Limited Partnership ("Natco") against Defendants Moran Towing of Florida, Inc. ("Moran"), M.D. Moody & Sons, Inc. ("Moody"), and Mobro Marine, Inc. ("Mobro") arising from the loss at sea, under

tow, of a crane and damage to the barge to which the crane was attached. This case was tried to the Court without a jury. During trial, Moran filed its Rule 52(c) Motion for Judgment on Partial Pleadings (Dkt. 120), on which the Court heard oral argument from Counsel for all parties, and on which the Court has reserved ruling. The Court hereby denies such motion.

Subsequent to trial the following documents were filed: Natco's Amended Proposed Findings, etc. (Dkt. 137), Mobro and Moody's Amended Findings, etc. (Dkt. 139), and Moran's Proposed Revised Findings, etc. (Dkt. 142). Upon due consideration of the testimony and evidence presented herein, the argument of Counsel, and the proposed findings submitted by the parties, the Court issues [2] the following as its findings of fact and conclusions of law, in accordance with Rule 52, Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

A. Factual Background

1. *General*

Natco is a limited partnership engaged in the marine construction and dredging business; its managing general partner is Great Lakes Dredge & Dock Company ("GLDD"). Moran is a corporation that provides towing services. Moody is a corporation which rents land-based construction equipment, such as self-propelled, tracked (or "crawler") cranes, to contractors. Moody shares a Green Cove Springs

facility and some employees with Mobro, a corporation which charters marine equipment, such as barges.[1]

In September of 1995, Natco determined that a construction project that it had undertaken in New York harbor would require the use of a barge-mounted crane, which barge had a current United States Coast Guard load-line certificate.[2] Natco thus undertook, through the purchasing

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1. As Mobro and Moody are sister corporations which share an identity of interest in this action, for much of the rest of this Order, they will simply be referred to collectively as "Mobro-Moody."

2. Natco's need to use the crane barge offshore, outside of New York harbor, was apparently the source of its need for a load line certified barge. *See* 46 U.S.C. § 5103(a) ("A vessel may be operated only if the vessel has been assigned load lines."); 46 U.S.C. § 5102(a) ("[T]his chapter applies to the following: (2) a vessel on the navigable waters of the United States."). A brief explanation of what a load line is follows.

The more a vessel is loaded, the more water she displaces (i.e., the farther she tends to sink into the water), decreasing her freeboard and increasing her vulnerability to sinking caused by weather and seas. *See, e.g., Director General of the India Supply Mission v. S.S. Maru*, 459 F.2d 1370, 1375 & n.7 (2d Cir. 1972). A vessel's load line, as indicated by the Plimsoll mark on her hull, is the point past which she cannot legally be loaded for safety purposes. *See, e.g., Dow Chemical Co. v. Texaco Refining & Marketing, Inc.*, 887 F. Supp. 853, 856 n.3 (E.D. Va. 1995). (The Plimsoll mark is a circle intersected by a horizontal line and is located amidships on a ship's hull. Webster's Third New Int'l Dictionary 1741 (1971). The mark derives its name from Samuel Plimsoll, M.P., who sponsored

(Cont'd)

department of [3] GLDD, to procure such a barge. Specifically, on September 20, 1995, Robert Mackay, a GLDD purchasing agent, contacted Moody, from whom Mackay regularly rented cranes, and wound up speaking with John Hall, general manager of Mobro.

Apparently Mackay and Hall initially agreed to the use of a pedestal-type crane barge[3] for $16,500 per month. However, when it was discovered that the pedestal crane barge did not have a current load line certificate, Hall proposed the use, at the same price, of an available load-lined barge, the MOBRO 133, that had on board a normally land-based 55-ton American brand self-propelled crawler crane with a roughly 74,000 pound counterweight. As such met Natco's needs, Mackay agreed to this alternative. However, as Hall could not provide for the towage of the crane barge to New York, it was left to Natco to arrange for such otherwise, with Hall only agreeing to deliver the crane barge from Mobro-Moody's Green Cove Springs facility to

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(Cont'd)
the initial load line legislation in Britain. *See S.S. Maru*, 459 F.2d at 1375.) The current load line legislation is set forth in 46 U.S.C. §§ 5101-5116. Although responsibility for enforcement of the load line legislation lies with the United States Coast Guard, the American Bureau of Shipping ("ABS"), a non-profit classification society, carries out load line surveys of vessels on behalf of the Coast Guard. *See Dow Chemical*, 887 F. Supp. at 856 n.3. Thus what is technically a United States Coast Guard load line certificate is often referred to as an "ABS load line certificate," as happened in this case.

3. A barge onto which a crane has been permanently mounted on a raised platform, or pedestal.

a point downstream of the Jacksonville bridges.[4] As it turned out, the crawler crane on board the MOBRO 133 was owned by Moody, and had been rented to Mobro by Moody.

* * *

[9] * * *

4. *The Towage Contract Between Natco and Moran*

As noted above, when Mackay and Hall were negotiating for the charter of the Mobro 133, it was determined that Mobro-Moody could not provide for the towage of the crane barge to New York; it was thus left to Natco to arrange for such otherwise, with Mobro-Moody only agreeing to deliver the crane barge to a point downstream of the Jacksonville bridges. Mackay thus passed the task of arranging for towage to Tim Burke ("Burke"), another GLDD purchasing agent. Burke contacted Moran, determined that it had a suitable tug, and agreed to a price of $45,500 to tow the Mobro 133 from Jacksonville to New York.

As a result of these discussions between Burke and Moran, Moran drafted a Towage Contract (Moran Ex. 1) and Natco generated a Purchase Order (Natco Ex. 5). Specifically,

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4. The Court notes that both the city of Jacksonville and the town of Green Cove Springs lie on the St. Johns River, with Green Cove lying some miles south of Jacksonville. As the St. Johns River flows north before flowing east out into the Atlantic Ocean, delivery of the crane barge "downstream of the Jacksonville bridges" would entail its delivery north, up the St. Johns River, to a point closer to the Atlantic Ocean than Green Cove Springs.

on September 20, 1995, a representative of Moran generated the Towage Contract, signed it, and faxed it to Burke, who made some changes thereto (i.e., the addition of the name of the Dorothy Moran beside paragraph 1 on [10] page 1; the striking of certain language in paragraph 12), counter-signed it, and faxed it back to Moran.[12] At or about the same time — he can't remember if it was before or after he signed the Towage Contract — Burke generated and signed the Purchase Order and then transmitted it to Moran; however, no representative of Moran ever countersigned the Purchase Order.[13]

Natco and Moran agree that the Towage Contract (Moran Ex. 1) sets forth at least some, if not all, of the terms of their agreement for the towage of the Mobro 133 and its crane. However, Natco contends that its Purchase Order (Natco Ex. 5) supplies additional — and possibly superseding — terms applicable to the towage agreement, while Moran maintains that only the Towage Contract applies.

5. *Delivery of the Barge by Mobro-Moody to Moran*

At about 1300 hours on September 21, 1995, a Mobro tug delivered the Mobro 133, with the crane on board, to Moran's docks in downtown Jacksonville. By prior

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12. Through his deposition testimony (read into the record at trial), Burke identified as his own the signature that appears on behalf of the "Party of the Second Part" on the Towage Contract.

13. The only signature that appears on the Purchase Order is identical to the signature on the Towage Contract that Burke identified as his own.

arrangement of Natco and Moran, the Mobro 133 was to be towed to New York by the M/T Dorothy Moran, a 3300 horsepower hawser tug. The crew of the Dorothy Moran included, among others, Captain Thomas Rowe ("Rowe"), her master, and Captain James McLaughlin ("McLaughlin"), who replaced the mate for the voyage because of McLaughlin's greater offshore experience.

Shortly following the delivery of the Mobro 133 to Moran's docks on September 21, 1995, Rowe, McLaughlin, and other crew members of the tug, along with Moran's Port Engineer, conducted a walk-around inspection of the Mobro 133. According to Rowe, who testified that he was "in charge" [11] of the inspection, they were generally examining the seaworthiness of the barge, including such things as the securement of her hatches. As part of this inspection, Rowe took photographs of various parts of the barge, crane, other cargo on board the barge (e.g., two spuds), and their securements; Rowe testified that taking such photographs is a normal part of his pre-tow walk-around inspection.

During his inspection, Rowe noted and took photographs of several items, including: the manner in which the hook of the boom was lashed to the deck, an arrangement the he "had never seen . . . before"; the fact that the boom was still elevated, since in his experience it was usually either laid in a cradle or dismounted from the crane and secured to the deck; a loose rope that ran through the boom and hung down to the deck, which rope Rowe directed his crew to tie off to the barge's forward double bits; the lack of any support underneath the crane's counterweight, which he had observed was usually present; the use of only four turnbuckles to secure the crane,

as he usually saw six to eight; and the lack of any running lights, which he directed his crew to rig prior to departure.

Although Rowe admits that he has no specific experience in the securement of items (such as cranes) to barges in preparation for a tow, he testified that in the roughly twenty years that he has held a Coast Guard master's license he has conducted more than 250 ocean tows, and, specifically, that prior to September 1995 he had towed a barge with a crawler crane on board on some ten to twelve occasions. Based on his observational experience, Rowe testified that he did not feel that the crane's securements were inadequate, and thus did not think that the Mobro 133 was unseaworthy; further, Rowe testified that if he had thought that the securements were inadequate, and the Mobro 133 thus unseaworthy, he would not have sailed.

[12] 6. *Towage of the Barge by Moran*

As shown by the Dorothy Moran's log book (Plaintiff's Exhibit 20), the voyage to New York was estimated to take about four-five days. Thus, prior to departure on September 21, 1995, Row obtained a five-day weather forecast for the Atlantic coast of the United States (covering the entire track of his voyage) from the National Oceanographic and Atmospheric Administration; this forecast called for shifting and increasing wind and an increasing wave height, Further, during the tow, Rowe received updated weather forecasts and monitored weather broadcasts and bulletins via radio.

The log of the M/T Dorothy Moran and the deposition testimony of Rowe (read into the record at trial) show the

following: The Dorothy Moran, with the Mobro 133 in tow, departed Moran's Jacksonville docks at 1430 on September 21, 1995. After exiting the entrance to the St. John's River, the Dorothy Moran set a roughly Northeast course along the Atlantic coast of the United States at 200 shaft rpm (roughly ten knots); the wind was blowing 10-15 knots NNE and wave height was 2-3 feet. The Dorothy Moran continued this basic course and speed throughout the remainder of September 21 and all of September 22 (only altering her course once, at 1200 hours on September 22, to one roughly North-Northeast), until the early morning of September 23.

At 0510 hours and then again at 0540 hours on September 22 the Dorothy Moran reduced her shaft rpm in 25 rpm increments (and thus reduced her speed) due to weather. By 0600 on September 23, the Dorothy Moran was only making 7 knots (150 shaft rpm); the wind had increased to 20-25 knots NW and seas were 8-10 feet. At 1130 hours, corresponding to a log entry "weather & seas building," the Dorothy Moran reduced her shaft rpm to 100. At 1200 hours, her log indicates that the Dorothy Moran was only making 3.1 knots (100 shaft rpm); the wind was blowing 20-25 knots (no direction specified); and seas were 8-10 feet. By 1800 hours, the Dorothy Moran was still turning the [13] same shaft rpm (100) and was making slightly better speed (3.5 knots), but the sea height had increased to 8-12 feet out of the NNE.

At 0001 hours on September 24, the Dorothy Moran was still turning the same shaft rpm (100) but was making a slower speed (2.5 knots); the wind speed was 20-25 knots (no direction specified) and the sea height remained at 8-12

feet out of the NNE. By 0600 hours, the Dorothy Moran was still turning the same shaft rpm (100), but was making an even slower speed (1.9 knots); the wind speed had increased to 25-30 knots (no direction specified) and the sea height remained at 8-12 feet out of the NNE. Several hours later, at 0830 hours, the Dorothy Moran's log notes that the wire holding the hook down to the bow had parted and the crane began to rock on the barge. Shortly thereafter, at 0850 hours, the Dorothy Moran changed course to North-Northwest (heading in closer to the coast and hopefully calmer weather) in an effort to reduce the rocking motion of the crane; at this time she was only making 1.4 knots. In fact, the course change did bring the Dorothy Moran into somewhat calmer weather: as her log indicates, by 1200 hours on September 24, turning 75 shaft rpm and making a slightly better speed of 1.8 knots, she was only experiencing 20-25 knot NE winds and seas of 6-8 feet. Then, at 1458 hours on September 24, the crane was observed to slip off the stem of the barge, off of Cape Hatteras, North Carolina. The loss of the crane was observed by McLaughlin, who estimated that the tug was about 2000 feet away from the barge at the time. According to McLaughlin's testimony, the back of the crane slid off the back of the barge first, with the rest of the crane following thereafter. At the time that the crane was lost overboard, the recorded seas were still 6-8 feet out of the NE, but the wind had died down to 10-15 knots NE. After conferring with Moran's New York office following the loss of the crane, her log indicates that the Dorothy Moran changed course to due west to "get inshore for calmer water."

Appendix D

[14] 7. *Inspection of the Barge After Loss of the Crane*

Subsequent to the loss of the crane, at the request of the Marine Office of America ("MOAC"), GLDD's insurance underwriter, Robert Willis ("Willis"), a marine surveyor with Hull and Cargo Surveyors, Inc., performed a survey of the Mobro 133 as she lay in Norfolk, Virginia,. Willis recorded his observations in a survey (Natco Ex. 27). Generally, this survey found minimal damage to the hull of the Mobro 133: two roughly 5 foot long areas along her stem that had been buckled down slightly; the top of her stem navigation light stand had been torn off and the stand otherwise distorted; and four of her timber crane mats had been shifted aft from their original position and split and crushed in several areas.

The Mobro 133's deck fittings (i.e., the attachment points of the securements that held down the crane) and securements did not fare so well. The forward pad eye, which restrained the hook, was intact, but the wire which was attached thereto had parted and frayed. Sixty feet of the rope that had run through boom truss was found on the deck, parted and frayed, and apparently no longer attached to the barge's forward double bits. The pad eye just forward of the crane, which had secured the wire ropes that ran around the crane's front axle, was found to have been torn through, with the shackle and wire ropes missing. The vertical plate of the pad eye just aft of the crane, which had secured the wire ropes that ran around the crane's rear axle, was found to have been torn completely off its deck, with the shackle and wire ropes missing. The two starboard side pad eyes, which had secured the two turnbuckles affixed to the right side of the crane's track assembly, were found intact and only slightly bent,

with their turnbuckle assemblies still attached thereto, both having apparently failed at the ends attached to the crane's track assembly. The forward port side pad eye, which had secured the turnbuckle affixed to the left front portion of the crane's track assembly was found intact, but with the [15] entire turnbuckle assembly missing. The stem port side pad eye, which had secured the turnbuckle affixed to the left rear portion of the crane's track assembly was bent aft, with part of the vertical plate tom loose, and only the lower portion of the turnbuckle remaining.

* * *

[23] * * *

B. As to Natco and Moran

1. *Governing Contract*

The Court concludes that the Towage Contract (Moran Ex. 1) sets forth all of the terms and conditions of the towage agreement between Natco and Moran. It is true, as Natco has argued, that the Towage Contract lacks an integration clause, and that the Purchase Order (Natco Ex. 5), an agreement prior or contemporaneous to the Towage Contract, could therefore provide additional terms of that agreement; however, Natco has simply not pointed to any evidence establishing that Moran ever accepted, or later ratified, the Purchase Order.[20] In contrast, the Towage Contract bears the

20. Notably, Natco's Amended Proposed Findings of Fact and Conclusions of Law (Dkt. 137 at ¶ 27) simply states "Burke caused (Cont'd)

signatures of representatives of both Natco and Moran. More importantly, unlike the Purchase Order, the Towage Contract bears the signature of a representative of Natco, the party against whom it is sought to be enforced. As the Towage Contract is the only document as to which both parties assented, such is the only document to which the Court will refer to supply the terms of the parties' towage agreement.

2. *Responsibility for Securement of Crane and General Seaworthiness of Mobro 133*

Accordingly, the Court concludes that paragraph 4 of the Towage Contract provides the only applicable contractual provision, as between Natco and Moran, regarding responsibility for the seaworthiness of the Mobro 133 and securement of the crane. Specifically, paragraph 4 provides:

> [24] Second Party [i.e., Moran] shall fit out and maintain the tow for the voyage in a proper and sufficient manner in all respects, including, among others, lights, signalling [sic] equipment, manning, etc.

Thus, contractually, as between Natco and Moran, Natco bore all responsibility for the proper securement of the crane on board the Mobro 133 and for the Mobro 133's seaworthiness

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(Cont'd)

a purchase order to be issued by Natco to Moran Florida, which Moran Florida accepted," with no reference to any particular testimony or documents supporting the conclusion that Moran accepted the Purchase Order.

in general.[21] Therefore, as between Natco and Moran, any fault for the loss of the crane rests upon Natco.[22]

3. *Moran's Towage of the Mobro 133*

Paragraph 14 of the Towage Contract provides, in pertinent part, as follows:

> The parties hereto specifically disclaim any warranty of workmanlike service, or warranty of seaworthiness by and of the tug, or any warranty by Moran or the tug of any kind whatsoever. Any liability of Moran, the tug or its equipment, or

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21. Natco argues that, by directing his crew to secure the loose line that ran through the boom of the crane Rowe acted as an agent of Moran, somehow assumed responsibility for securement of the crane. However, Natco has not presented any testimony as to the manner in which said line was actually secured and has offered no properly qualified expert testimony that would establish whether such securement was inadequate (i.e., negligent) and/or whether another manner of securement would have prevented the loss of the crane. As set forth in part II.B.3 hereof, the mere fact that the crane was thereafter lost is insufficient to establish Moran's liability.

22. Alternatively, assuming that Natco's Purchase Order also controlled and that the Towage Contract was thereby modified to place upon Moran responsibility for the proper securement of the crane and for the Mobro 133's seaworthiness in general, the Court concludes that Natco has failed to show that Moran's securement, or lack thereof, was negligent. For, even assuming that Moran had the duty to secure the crane for the voyage, Natco has presented no properly qualified expert testimony or other evidence which would establish that the manner in which the crane was secured was inadequate and contributed to the loss of the crane.

> their underwriters, shall be for negligence only, which negligence shall not be presumed, in fact or in law, but must be affirmatively established.

This contractual provision is in accord with the current state of the law of towage, as noted by the Court in its November 18, 1997, Order (Dkt. 90) on motions for summary judgment:

> Under a towage contract, the tug is not a bailee of the vessel in tow, or of its cargo. *Stevens v. The White City*, 285 U.S. 195, 200, 52 S.Ct. 347, 349, 76 L.Ed. 699 (1932). The tug owes a duty to its tow to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. *Id.* at 202, 52 S.Ct. at 350. "The mere fact that a tow receives injury does not render the tug liable. Negligence must be affirmatively shown and the burden of proving negligence rests [25] upon those seeking to establish liability therefor." *Stall & McDermott v. The Southern Cross*, 196 F.2d 309, 311 (5th Cir. 1952). In a towage contract, the owner of the tow is responsible for the tow's seaworthiness and the tug's owner is responsible for its safe navigation. *Nat G. Harrison Overseas Corp. v. American Tug Titan*, 516 F.2d 89, 94 (5th Cir. 1975). The tug is not required to make a detailed inspection of a barge that it has contracted to tow. *Id.* at 94. A tug owner is not responsible for the "proper stowage of cargo on a barge, for an honest error of judgment on the part of the tug's master, nor for nonapparent unseaworthiness of the

> barge." *Id.* at 94. If the tug, however, is placed on notice of either an unseaworthy condition or some other fact which might influence the towage, the tug must use reasonable care under those circumstances. *Tidewater Marine Activities, Inc. v. American Towing Company, Inc.*, 437 F.2d 124, 130 (5th Cir. 1970). The tug cannot complain about a condition of unseaworthiness or other weakness that caused the loss if it knew of the condition and failed to use reasonable care under those circumstances. *Id.*; *King Fisher Marine Service, Inc. v. Sunbonnet*, 724 F.2d 1181, 1184 (5th Cir. 1984). Moreover, the tug cannot disclaim responsibility for the loss if the alleged unseaworthiness is so apparent that it would be negligent for the tow to attempt to proceed. *King Fisher Marine Service, Inc.*, 724 F.2d at 1184.

(Dkt. 90 at 8-9).

As the foregoing establishes, the loss of the crane does not create any presumption that Moran was negligent in its towage of the Mobro 133. Rather, the burden is upon Natco to show that Moran was negligent. As the Court has not been presented with any properly qualified expert testimony or other evidence regarding the applicable duty of care of a tower, the Court cannot conclude that Moran deviated from that standard of care, and therefore must conclude that Natco has not shown that Moran failed to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of a similar service. *See The White City*, 285 U.S. at 202. Applying this standard, the Court concludes that Natco has failed to show that Moran caused the loss of the crane.

Further, there was simply no properly qualified expert testimony or other evidence introduced at trial that would establish that the Mobro 133 (including the crane) was unseaworthy in any apparent way when presented to Moran (whether as a result of the securements of the crane or otherwise); Natco [26] therefore cannot predicate Moran's liability on its failure to use due care in the face of any apparent unseaworthiness of the barge and crane.

* * *

[29] III. CONCLUSION

Pursuant to the relevant contracts, Natco alone had the duty to ensure that the crane was adequately secured to the Mobro 133 prior to its departure on the ocean tow from Jacksonville to New York. Therefore, the subsequent loss of the crane is the fault of Natco. Nonetheless, even assuming, as Natco has contended, that such duty fell upon Mobro, Moody, Moran, or all three, Natco could still not prevail because it did not introduce any expert testimony on key issues, including the following: the relevant standard of care in securing a crane to a barge for an ocean tow; whether Mobro or Moody deviated from that standard and whether such deviation cause the loss of the crane; whether Moran deviated from that standard and whether such deviation cause the loss of the crane; whether the crane's asserted inadequate securement, and thus its unseaworthiness, was open and apparent upon the barge's delivery to Moran; the relevant standard of care of a tower such as Moran; and whether Moran deviated from that standard of care.

Appendix D

The mechanical engineering knowledge and/or marine industry experience necessary to evaluate the adequacy of the securements made are simply not within the common knowledge of the Court; by the same token, the mechanical engineering knowledge and/or towing industry experience necessary to evaluate the manner in which the barge was towed are simply not within the common knowledge of the Court. Because Natco did not present any qualified expert testimony, or other evidence, on these issues, there is a complete absence of any competent evidence which would establish the relevant standard of care of Defendants, much less their breach thereof, let alone any causal link with the loss of the crane. Therefore, the Court concludes that Defendants are entitled to the rendering of a judgment in their favor on Plaintiff's claims of negligent securement and towage.

* * *

[31] * * *

DONE AND ORDERED, at Jacksonville, Florida, this 16th day of February, 1999.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN *NATCO LIMITED PARTNERSHIP v. MORAN TOWING OF FLORIDA, INC., et al.* DATED AND FILED NOVEMBER 9, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11798

D. C. Docket No. 96-00712-CIV-J-21B

NATCO LIMITED PARTNERSHIP,
a limited partnership,

Plaintiff-Counter-
Defendant-Appellant,

versus

MORAN TOWING OF FLORIDA, INC., a corporation,
M.D. MOODY & SONS, INC., a corporation,

Defendants-Counter-claimants-
Cross-claimants-Appellees,

MOBRO MARINE, INC., a corporation,

Defendant-Counter-claimant-
Cross-claimant-Cross-
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 9, 2000)

Appendix E

Before CARNES and RONEY, Circuit Judges and O'KELLEY*, District Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.**

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* Honorable William C. O'Kelley, U.S. District Judge for the Northern District of Georgia, sitting by designation.

** 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX F — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN *NATCO LIMITED PARTNERSHIP v. MORAN TOWING OF FLORIDA, INC., et al.* DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 10, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-11798-DD

NATCO LIMITED PARTNERSHIP,
a limited partnership,

Plaintiff-
Counter-Defendant-
Appellant,

versus

MORAN TOWING OF FLORIDA, INC., a corporation,
M.D. MOODY & SONS, INC., a corporation,

Defendants-
Counter-claimants-
Cross-claimants-
Appellees,

MOBRO MARINE, INC., a corporation,

Defendant-
Counter-claimant-
Cross-claimant-
Cross-defendant-
Appellee.

Appendix F

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: CARNES AND RONEY, Circuit Judges and O'KFLLEY*, District Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

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* Honorable William C. O'Kelley, U.S. District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX G — CHARLES E. LUGENBUHL AND DAVID B. SHARPE, *THE LAW OF TOWAGE AT THE MILLENNIUM: WHAT CHANGES ARE NEEDED?*, 73 TUL. LAW REV. 1811 (1999)

[Omitted here but submitted separately as Lodging]

APPENDIX H — JOEL K. GOLDSTEIN, *THE FUTURE OF MARITIME LAW IN THE FEDERAL COURTS: A FACULTY COLLOQUIUM, TOWAGE*, 31 J. MAR. L. & COM. 335 (2000)

[Omitted here but submitted separately as Lodging]

APPENDIX I — 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 12-4 at 249 (3d ed. 2001)

[Omitted here but submitted separately as Lodging]